

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ORIGINAL
U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
SEP 08 2006

SUSAN B. LONG and DAVID
BURNHAM,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

)
)
) COMPLAINT FOR DECLARATORY
) JUDGMENT AND INJUNCTIVE
) RELIEF UNDER THE FREEDOM OF
) INFORMATION ACT
)
) Civil Action No.: **06 -CV- 1086**
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LAWRENCE K. BAERMAN, CLERK

ALBANY

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Plaintiffs Susan B. Long and David Burnham, by their undersigned attorneys, complain of the United States Department of Justice, as follows; allegations are made upon knowledge with respect to Plaintiffs and their own actions and interactions, and upon information and belief as to all other matters.

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended. Plaintiffs seek injunctive and other appropriate relief to obtain the disclosure and release of agency records wrongfully withheld from them by the Department of Justice, i.e., to obtain the disclosure of data from the United States Department of Justice Civil Division case management system database known as "CASES," as well as descriptive information relating to the CASES database.

JURISDICTION AND VENUE

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B).

3. Venue also lies in this court under 5 U.S.C. § 552(a)(4)(B).

THE PARTIES

4. Plaintiff Susan B. Long is a statistician and an Associate Professor at the Martin J. Whitman School of Management at Syracuse University. Professor Long is also Co-Director of the Transactional Records Access Clearinghouse ("TRAC"), a research center at Syracuse University, Syracuse, New York.

5. Plaintiff David Burnham is Co-Director of TRAC, a long-time journalist, and an Associate Research Professor in the S.I. Newhouse School of Public Communications at Syracuse University.

6. Plaintiffs bring this action on behalf of themselves as citizens, as well as in their capacity as Co-Directors of TRAC.

7. Defendant, the United States Department of Justice, is a department of the Executive Branch of the United States. The Civil Division is a division of the Department of Justice. The Department of Justice is a federal agency within the meaning of FOIA, and has possession or control of the records and data that Plaintiffs seek in this action.

STATUTORY FRAMEWORK

8. FOIA requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(a)(3)(A).

9. Upon receiving a FOIA request, an agency has twenty working days to respond. 5 U.S.C. § 552(a)(6)(A). If the agency denies the FOIA request, the requester is entitled to appeal the determination within thirty days. FOIA requires the agency to make a determination with respect to an appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii).

10. Although an agency may grant itself an extension in "unusual circumstances," FOIA does not permit an agency to delay an initial response or an appeal determination for longer than ten working days. 5 U.S.C. § 552(a)(6)(B).

11. A requester is entitled to a waiver of fees associated with responding to a FOIA request when the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

12. FOIA expressly provides that a requester "shall be deemed to have exhausted his administrative remedies. . . if the agency fails to comply with the applicable time limit provisions" governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

PLAINTIFFS' FOIA REQUEST

13. TRAC is a data-gathering, data-research and data-distribution organization located at Syracuse University. TRAC was established in 1989 and has been supported by Syracuse University, foundations such as the Rockefeller Family Fund, The New York Times Company Foundation, the John S. and James L. Knight Foundation, the Beldon Fund and the Open Society Institute, and various research grants and contracts.

14. TRAC's purpose is to make information about the federal government's civil enforcement and regulatory efforts, along with information on related staffing and

spending, accessible and understandable to the public. It accomplishes this purpose by making use of FOIA. TRAC begins by obtaining data largely through FOIA. Then, using a variety of techniques, TRAC checks that data for its accuracy and completeness and carries out detailed analyses. Next, special databases are created containing the data combined with analysis results. Written reports also are created. Finally, the databases and the reports are then made available to the public, as well as to Congress, news organizations, public interest groups, businesses and scholars, through TRAC's public website and TRACFED, a subscription service. TRAC's website can be accessed at www.trac.syr.edu.

15. The Civil Division of the Department of Justice maintains a case management system database known by the acronym CASES. The CASES database includes records containing various case identifiers and descriptors, names of plaintiffs and defendants, client federal agencies, assigned attorneys, case dispositions, monetary relief sought and awarded, and the time expended by Department of Justice staff. CASES is used by the Civil Division to manage its litigation workload and to generate statistical, management and budget information.

16. By letter dated June 7, 2004, pursuant to the provisions of FOIA, Plaintiffs, acting in their capacity as Co-Directors of TRAC, sought disclosure of the following information from the Department of Justice Civil Division:

- (A) an electronic copy of those records pertaining to court cases filed or pending in court since October 1, 1999 (FY2000 to date) contained in the CASES database (these requested records are hereinafter referred to as "Part A" of Plaintiffs' FOIA request); and
- (B) the following descriptive information about the CASES database:
 - (i) table schema and definitions of all codes used;

- (ii) records describing the scope of coverage of cases included (and excluded) from CASES;
- (iii) changes in CASES that have occurred during this period, including changes in case coverage, or in tables, fields, and codes that have occurred and when these changes took place;
- (iv) current data input and users' manuals, including any directives supplementing (or used in place of) these;
- (v) descriptions of all regularly prepared reports currently using CASES; and
- (vi) records describing any validation, error checking or other procedures currently used to ensure data quality (these requested records are collectively hereinafter referred to as "Part B" of Plaintiffs' FOIA request).

Plaintiffs further requested that whenever the requested documents existed in electronic form, they be provided on computer media. A true and correct copy of Plaintiffs' June 7, 2004 letter to James M. Kovakas, the Attorney In Charge of the Civil Division's Freedom Of Information/Privacy Act Office ("Mr. Kovakas"), is attached hereto as Exhibit A.

17. Plaintiffs' FOIA request was designated Request No. 145-FOI-7814 by the Civil Division.

18. Plaintiffs sought disclosure of the requested CASES data on their own behalf, and on behalf of TRAC, because such data would be invaluable in preparing TRAC's databases and reports, which would then be made available to the public.

19. The requested CASES data are in many ways unique, and will allow Plaintiffs and TRAC to undertake a more detailed examination of the operation of the federal civil justice system. Disclosure of the requested CASES data is in the public interest because it will contribute significantly to public understanding of the operations and activities of the federal government.

20. By letter dated July 14, 2004, the Department of Justice denied Part A of Plaintiffs' FOIA request. Mr. Kovakas, on behalf of the Department of Justice, stated that Plaintiffs' request was being denied: (i) pursuant to 5 U.S.C. § 552a(b), because they had not supplied the appropriate releases for records subject to the Privacy Act; (ii) pursuant to 5 U.S.C. § 552(b)(6), because the privacy interests of individuals who are parties to the civil matters contained in CASES outweighed any potential public interest; (iii) pursuant to 5 U.S.C. § 552(b)(3), because the requested data identified pending cases that have been filed under seal; (iv) pursuant to 5 U.S.C. § 552(b)(5), because the CASES data contain attorney work product; and (v) pursuant to 5 U.S.C. § 552(b)(7)(A), because CASES includes data whose release would interfere with ongoing investigations. A true and correct copy of Mr. Kovakas' July 14, 2004 letter to Plaintiffs is attached hereto as Exhibit B.

21. By letter dated August 23, 2004, Mr. Kovakas, responding to Part B of Plaintiffs' FOIA request on behalf of the Department of Justice: (i) furnished a few documents responsive to Plaintiffs' request for table schema and definitions of all codes used in CASES (Request B(i)); (ii) provided a listing of case types in response to Plaintiffs' request for records describing the scope of coverage of cases included (and excluded) from CASES (Request B(ii)); (iii) in response to the request for information about changes in CASES that have occurred during the relevant period (Request B(iii)), stated that the Department of Justice was unaware of any changes to the database since October 1, 1999, and that there were no responsive records; and (iv) stated that any documents or data encompassed by the remaining sections of Part B of Plaintiffs' FOIA request were exempt from disclosure. As to the documents and data claimed to be exempt from disclosure, Mr. Kovakas' letter stated that: (i) the CASES user's manual and

operating instructions (Request B(iv)) were exempt from disclosure pursuant to 5 U.S.C. §§ 552(b)(2), because they are internal Civil Division documents for use only by authorized personnel; (ii) all documents describing quality assurance procedures used to ensure the quality of CASES data (Request B(vi)) were internal documents exempt from disclosure pursuant to 5 U.S.C. §§ 552(b)(2); and (iii) with respect to "descriptions of all regularly prepared reports currently using CASES" (Request B(v)), no single document described all regularly prepared reports, but the reports themselves were exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), (b)(5), (b)(6), (b)(7)(C) and/or (b)(7)(D), as well as 5 U.S.C. § 552a(b). A true and correct copy of Mr. Kovakas' August 23, 2004 letter to Plaintiffs is attached hereto as Exhibit C.

Plaintiffs' Appeal Regarding Part A Of Their FOIA Request

22. By letter dated September 2, 2004, Plaintiffs appealed the denial of Part A of their FOIA request to the Office of Information and Privacy ("OIP") of the Department of Justice (Appeal #04-2793). In their letter to OIP, Plaintiffs pointed out that the Privacy Act does not provide any independent basis for withholding information required to be released by FOIA, and that the CASES database cannot be shielded from disclosure due to privacy concerns, since the requested records relate solely to cases that have already been filed in court and are matters of public record.

23. In their appeal letter, Plaintiffs also addressed the claims of exemption under Sections 552(b)(3), (b)(5) and (b)(7), noting that those exemptions could apply to only a small fraction of the data in CASES and would not support withholding the entire database. Cases are filed under seal only in exceptional situations and, even in those few instances, the fact of filing is generally a matter of public record. Likewise, very few court actions relate to open enforcement investigations; indeed, many of the matters are

claims brought against the U.S. government. Further, the Department of Justice website states that the CASES database "is used as a management tool, and is not intended to support the day-to-day activities of attorneys litigating the cases," so the CASES database should contain little, if any, attorney work product. Accordingly, Plaintiffs asserted that any records containing information about sealed cases, law enforcement investigations, or attorney work product should be redacted, and the balance of the CASES database should be produced. A true and correct copy of Plaintiffs' September 2, 2004 appeal letter to OIP is attached hereto as Exhibit D.

24. On August 15, 2005, Mr. Kovakas telephoned Plaintiff Long to discuss Plaintiffs' FOIA request for the CASES database. Mr. Kovakas stated that the CASES database was very large and contained many records that were responsive to Plaintiffs' FOIA request. However, he also stated that there were many practical and technical difficulties inherent in producing the CASES database to Plaintiffs. Mr. Kovakas rejected Plaintiff Long's request to meet with him and his technical staff to discuss the technical difficulties associated with producing the database and possible acceptable alternatives.

25. Plaintiffs accordingly made a formal request to OIP, by letter dated August 23, 2005, seeking its intervention in facilitating a prompt resolution of its appeal. In that letter, Plaintiffs suggested that the dispute could best be resolved through negotiation, with the aid of a mediator knowledgeable about FOIA. A true and correct copy of the August 23, 2005 letter from Mara L. Shreck of Ropes & Gray, LLP to OIP is attached hereto as Exhibit E. However, the Department of Justice refused to agree to such a meeting.

26. On September 2, 2005, OIP remanded Part A of Plaintiffs' FOIA request to the Civil Division for further processing of the responsive records. The Civil Division was directed to "disclose any non-exempt portions of [the requested] records" to Plaintiffs. A true and correct copy of the September 2, 2005 letter from Richard L. Huff, Co-Director of OIP, to Mara Shreck is attached hereto as Exhibit F.

Plaintiffs' Appeal Regarding Part B Of Their FOIA Request

27. By letter dated November 9, 2004, Plaintiffs filed an appeal with OIP from the Civil Division's final determination with respect to Part B of their FOIA request (Appeal #05-0355). In their letter to OIP, Plaintiffs noted that the government's search for documents responsive to Part B of their FOIA request was inadequate. They pointed out that, even if no single document existed that contains the information sought, that did not justify withholding documents that were responsive to the requests for table schema or descriptions of regularly prepared reports using CASES (Requests B(i) and (v)). They also noted that the few documents produced by the Civil Division appeared to be incomplete, such as the information concerning codes used in CASES. They also observed that, where records were provided, they were provided in paper form despite the stated request for receiving electronic copies, and the government did not explain its failure to furnish copies electronically.

28. In their appeal, Plaintiffs also asserted that the government had no legal basis for withholding the requested information. Plaintiffs noted that user manuals and supplemental directives, as well as records describing validation and quality assurance procedures, are not exempt from disclosure under 5 U.S.C. § 552(b)(2) because they do not contain highly sensitive information and do not relate solely to internal personnel

rules and practices of the agency. A true and correct copy of Plaintiffs' November 9, 2004 appeal letter to OIP is attached hereto as Exhibit G.

29. On April 4, 2005, the Civil Division supplemented its response to Plaintiffs' request for regularly prepared reports using CASES (Request B(v)) and supplied a list of reports from the Civil Division's internal website.

30. On September 19, 2005, OIP affirmed in part and remanded in part the Civil Division's action on Part B of Plaintiffs' FOIA request. OIP determined that the Civil Division had conducted an adequate search for records responsive to Plaintiffs' request for information about changes in CASES since October 1, 1999, and descriptions of all regularly prepared reports using CASES (Requests B(iii) and (v)). OIP remanded Plaintiffs' requests for user's manuals and supplemental directives (Request B(iv)), as well as validation and error checking procedures used to ensure data quality (Request B(vi)), to the Civil Division for further processing of responsive documents. The Civil Division was directed to send any releasable portions of those records to Plaintiffs. A true and correct copy of the September 19, 2005 letter from Richard L. Huff of OIP, to Mara Shreck is attached hereto as Exhibit H.

31. In a letter dated October 21, 2005, Plaintiffs requested that the OIP reconsider the adequacy of the Civil Division's production in response to their requests for table schema and definitions of codes used in CASES, records describing the scope of coverage of cases included in the database, and descriptions of reports prepared using CASES (Requests B(i), (ii) and (v)). In addition, Plaintiffs reiterated their request for a negotiation, with the aid of a mediator knowledgeable about FOIA, to facilitate resolution of this dispute. A true and correct copy of the October 21, 2005 letter from Mara Shreck to Richard L. Huff of OIP, is attached hereto as Exhibit I.

32. Once again, the Civil Division refused to agree to a meeting or negotiation to aid in the resolution of this matter.

Civil Division's Delayed Release of Records

33. Approximately six months after the OIP issued its remands, the Civil Division released three records to Plaintiffs, the sum of which fell far short of their FOIA requests.

34. On March 3, 2006, the Civil Division produced a document entitled "FOIA CASES Data Dictionary" compiled by its technical staff, as well as a Case Classification Manual dated June 2001 pertaining to the CASES database. A true and correct copy of the March 3, 2006 letter from Mr. Kovakas to Plaintiffs, which accompanied these materials, is attached hereto as Exhibit J.

35. On March 22, 2006, Janice Galli McLeod, FOIA Ombudsman for OIP, wrote to Plaintiffs, indicating that the Civil Division would make a "further and final response" to Plaintiffs' appeal from the disposition of Part B of their FOIA request in late March. Ms. McLeod also noted that Plaintiffs' letter of October 21, 2005, described in paragraph 31 hereinabove, had been treated as a request for reconsideration of OIP's appeal determination. Ms. McLeod recommended that Plaintiffs address any remaining questions regarding their Part B appeal, as well as their Part A appeal, to OIP staff attorney Jennifer Ashworth for her review and recommendations, after which a final letter from OIP would be forthcoming. A true and correct copy of Ms. McLeod's March 22, 2006 letter to Mara Shreck is attached hereto as Exhibit K.

36. On March 31, 2006, the Civil Division forwarded to Plaintiffs a CD allegedly containing "non-exempt data from the Civil Division's CASES data base from FY 2000 to the present" responsive to Plaintiffs' request. A true and correct copy of the

March 31, 2006 letter from Mr. Kovakas to Plaintiffs, which accompanied the CD, is attached hereto as Exhibit L.

37. Despite its release of these three records, the Civil Division wrongfully withheld many materials responsive to Plaintiffs' FOIA requests. As a result, on May 16, 2006, Plaintiffs wrote to Jennifer Ashworth at OIP, setting forth their concerns about the materials produced by the Civil Division. A true and correct copy of the May 16, 2006 letter from Patricia E. Campbell of Ropes & Gray LLP, to Jennifer Ashworth at OIP is attached hereto as Exhibit M.

38. In their letter to Ms. Ashworth, Plaintiffs offered to provide the Department of Justice with an additional 30 days to reconsider and clarify its position and provide an additional response to Plaintiffs' FOIA requests. Although far more than 30 days have now passed, the government has not released those materials that have been wrongfully withheld from Plaintiffs.

COUNT I
(Violation of FOIA)

39. FOIA requires the disclosure to the public of requested information unless the information is subject to one of nine enumerated exceptions.

40. Plaintiffs have duly requested under FOIA the disclosure of an electronic copy of records pertaining to court cases filed or pending since October 1, 1999 contained in the CASES database, as well as certain descriptive information relating to the CASES database. The Civil Division of the Department of Justice has wrongfully withheld many materials responsive to Plaintiffs' FOIA requests. The Civil Division has erroneously contended that the withheld materials are exempt from disclosure, it has withheld other materials without claiming any exemption, and it has failed to conduct an adequate search for responsive records.

41. Numerous tables and fields identified in the CASES Data Dictionary were wrongfully withheld from the CASES data produced on March 31, 2006. In the FOIA CASES Data Dictionary supplied to Plaintiffs on March 3, 2006, the Civil Division erroneously contended that many of those tables and fields are exempt from disclosure: (i) pursuant to 5 U.S.C. § 552(b)(6) due to privacy concerns; (ii) pursuant to 5 U.S.C. § 552(b)(5) because they constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;" or (iii) pursuant to 5 U.S.C. § 552(b)(2) ("low") as material "related solely to the internal personnel rules and practices of an agency." Other fields were withheld without any exemption being claimed.

42. The Civil Division's actions are contrary to law because Plaintiffs have only requested information relating to filed cases. The docket numbers, captions, and names of the parties involved in those cases are matters of public record, and the disclosure of this information cannot constitute an invasion of personal privacy. Similarly, contrary to the government's assertions, data fields identifying the attorneys assigned to matters, the type of assignments received by those attorneys, and the nature of the relief sought by the parties in the subject cases is not protected by Section 552(b)(5) because much of the information is already available to public.

43. Moreover, while the Civil Division withheld the bulk of the data fields on the basis that they are internal matters of a relatively trivial nature under Section (b)(2) ("low"), the information contained in those fields is not trivial in nature because it is essential to the usability of the data.

44. The Civil Division also failed to comply with the requirements of FOIA by not indicating when it had redacted information from the version of the CASES

database produced to Plaintiffs. FOIA requires that the amount of information deleted shall be indicated on the released portion of the record and, where technically feasible, redactions must be indicated at the place in the record where the deletion was made.

5 U.S.C. § 552(b).

45. In addition, the Civil Division wrongfully withheld information responsive to Plaintiffs' FOIA request for all records pertaining to court cases filed or pending in court since October 1, 1999. The CASES data released to Plaintiffs on March 31, 2006 included only data relating to closed cases, not all filed cases. Data relating to cases that are currently open have been wrongfully withheld.

46. The Civil Division has further wrongfully withheld information responsive to every one of Plaintiffs' FOIA requests for descriptive information about the CASES database.

47. Plaintiffs repeatedly have been assured that a CASES database schema would be provided to them, but no such database schema has been released to them. The Civil Division has also withheld numerous code tables that are identified in the CASES Data Dictionary, making the electronic data released to Plaintiffs essentially meaningless.

48. The Civil Division has wrongfully withheld information responsive to Plaintiffs' FOIA request for documents relating to regularly prepared reports that use the CASES database. To date, the Civil Division has only provided an incomplete list of reports from its internal website, and no descriptive information about these reports has been provided.

49. The Civil Division has also wrongfully withheld information responsive to Plaintiffs' FOIA request for information about changes in case coverage or CASES tables, fields and codes that may have occurred since October 1, 1999. Instead, the Civil

Division has denied that any such changes have taken place. However, the Case Classification Manual released to Plaintiffs is dated June 2001, and the creation of the Department of Homeland Security in 2003 resulted in a major reorganization of the federal government that Plaintiffs assert affected the manner in which information is recorded in CASES.

50. Finally, although the Civil Division has acknowledged that quality assurance is performed for it by an outside contractor, all documents describing these activities have been wrongfully withheld.

51. Plaintiffs have exhausted their administrative remedies under 5 U.S.C. § 552(a)(6)(c).

52. The public has a right to understand the federal government's civil litigation staffing and spending, and its civil enforcement activities. There is no legal basis for the Civil Division's refusal to provide the information duly requested by Plaintiffs under FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Susan B. Long and David Burnham, on behalf of themselves and as Co-Directors of TRAC, pray for judgment as follows::

- a. That this court order expedited proceedings in this action;
- b. That this court declare that the Department of Justice's refusal to release all records and data requested by Plaintiffs is a violation of FOIA, 5 U.S.C. § 552;
- c. That this court enter a mandatory injunction directing the Department of Justice to make all records and data requested by Plaintiffs immediately available to Plaintiffs, and in electronic format wherever available, without cost to Plaintiffs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii);

d. That this court direct the Department of Justice to state where redactions have been made in the records and data provided and to be provided to Plaintiffs, pursuant to 5 U.S.C. § 552(b);

e. That this court award Plaintiffs their reasonable attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

f. That this court grant Plaintiffs such other and further relief in their favor as the Court may deem just and proper.

Dated: September 7, 2006

Respectfully submitted,

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